BEFORE THE

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina's Notice of Suspension and Disconnection of Service of EveryCall Communications, Inc.	)))))	Docket No. 2010-233-C

AT&T SOUTH CAROLINA'S PROPOSED ORDER

This matter comes before the Commission upon a Petition for Temporary Emergency Relief to Prevent Suspension or Termination of Service ("Petition") filed by EveryCall Communications, Inc. ("EveryCall") requesting an order prohibiting BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina from suspending, discontinuing, or terminating wholesale service to EveryCall. EveryCall filed its Petition on July 6, 2010, AT&T South Carolina filed its Response on July 7, 2010, and the Commission heard oral argument on the Motion and Response on July 8, 2010. EveryCall was represented by John J. Pringle, Jr., AT&T South Carolina was represented by Patrick W. Turner, and the Office of Regulatory Staff ("ORS") was represented by Jeffrey M. Nelson. After hearing the parties' arguments, the Commission issued the directive attached hereto as Exhibit A on July 8, 2010. Having carefully considered the parties' submissions and arguments, we deny the Petition.

I. PROCEDURAL BACKGROUND AND FACTS

On December 6, 2006, the Commission approved a negotiated interconnection agreement ("ICA") between EveryCall and AT&T South Carolina.[1] That ICA provides that:

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[1] *See* Directive, *In re: Interconnection Agreement with between BellSouth Telecommunications, Inc., and EveryCall Communications, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996,* Docket No. 2006-363-C (December 6, 2006).

> Payment of ***all*** charges will be the responsibility of EveryCall.[2]
>
> EveryCall shall make payment to [AT&T South Carolina] for all services billed ***including disputed amounts.***[3]
>
> Payment for services provided by [AT&T South Carolina], ***including disputed charges,*** is due on or before the next bill date.[4]

On June 18, 2010, AT&T South Carolina sent EveryCall a letter: setting forth EveryCall's past due balance; quoting the operative language of the parties' ICA; noting that from December 15, 2009 to May 20, 2010, EveryCall paid AT&T South Carolina less than four-tenths of one percent of the net amount owed (the billed amounts less credits AT&T South Carolina applied for promotions and other adjustments) for that same time period; and demanding payment of all past due charges on or before specific dates in order to avoid suspension, discontinuance, and/or termination of service consistent with the ICA.[5] This letter and its attachments, which are supported by an affidavit, show that EveryCall does not pay the full amount of AT&T South Carolina's bills, nor does it pay the net amount of AT&T South Carolina's bills. This is confirmed by EveryCall's Petition, in which EveryCall acknowledges that it does not pay the full amounts AT&T South Carolina bills it for the services provided to it but, instead, it subtracts amounts that a telecommunications consulting firm believes are owed to EveryCall.[6]

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2 ICA, Attachment 7, p. 6, §1.4 (emphasis added).

3 *Id.*,(emphasis added).

4 *Id.*, p. 6, §1.4.1 (emphasis added).

5 In light of the confidential nature of the information set forth in letter and its attachments, AT&T South Carolina attached a redacted copy of these documents to its Response. At the oral argument, AT&T South Carolina provided an unredacted version of the letter and its attachments to the Commission and the parties, and we ruled that the unredacted version will be marked as confidential and will not be subject to public disclosure.

6 Petition at p. 3, ¶5.

II. DISCUSSION

An interconnection agreement is "the Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth in the [federal Telecommunications Act of 1996],"[7] and once a carrier enters "into an interconnection agreement in accordance with section 252, ... it is then regulated directly by the interconnection agreement."[8] Resolving EveryCall's Petition, therefore, requires us to apply the terms of the parties' ICA to the facts before us. In doing so, we are mindful that "[w]hen a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used," and our function "is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous."[9]

The ICA contemplates that disputes will arise between the parties over amounts owed, and it provides that EveryCall must "pay for all services billed, including disputed amounts." This language, which EveryCall agreed to and which we approved pursuant to federal law, is unambiguous, clear, and explicit. Accordingly, we find that EveryCall is required to pay all amounts AT&T South Carolina bills, including amounts EveryCall disputes.

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7 *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir. 2003),

8 *Law Offices of Curtis V. Trinko LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev'd in part on other grounds sub nom; Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). *See also, Mich. Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003) ("[O]nce an agreement is approved, these general duties [under the 1996 Act] do not control" and parties are "governed by the interconnection agreement" instead, and "the general duties of [the 1996 Act] no longer apply").

9 *Stewart v. State Farm Mut. Auto. Ins.*, 533 S.E.2d 597, 601 (S.C. Ct. App. 2000). To the extent that Georgia law may apply here, *see* ICA, General Terms and Conditions, p.16, §17 (Governing Law), we find that it is consistent with South Carolina law on this issue. *See Ben Farmer Realty, Inc.*, 649 S.E.2d 771, 774 (Ga. Ct. App. 2007)("If a contract contains no ambiguity, the court enforces the agreement according to its clear terms . . . ."); *Fernandes v. Manugistics Atlanta,* 582 S.E.2d 499, 503 (Ga. Ct. App. 2003)("Neither the trial court nor this Court is at liberty to rewrite or revise a contract under the guise of construing it.").

EveryCall argues AT&T South Carolina does not timely address its requests for promotional credits and related disputes and that, as a result, we should not require EveryCall to comply with the terms of the ICA. Although EveryCall provided an unverified document from August 2008 to support these allegations, we note that Attachment A to AT&T South Carolina's letter to EveryCall reflects a steady and significant stream of credits from AT&T South Carolina to EveryCall since that time. Moreover, assuming these allegations were true, nothing prevented EveryCall from bringing any concerns it may have had with the timeliness of this process to the Commission's attention. The plain language of the ICA that EveryCall signed and this Commission approved, however, prohibits EveryCall from paying less than the amount AT&T South Carolina bills.

EveryCall also notes that the merits of some of its disputes are at issue in other proceedings pending before the Commission. EveryCall is not a party to those proceedings, but even if it were, we find nothing in the record of those proceedings to prevent AT&T South Carolina from exercising its rights under the parties' ICA. A Joint Motion in those proceedings provides, in part, that "[o]nce the Commission has issued an order resolving the issues in the Consolidated Phase, the parties will work in good faith to address all remaining unresolved claims and counterclaims related to the Consolidated Phase and determine what, if any, dollar amounts are owed or credits due each party."[10] That Joint Motion, however, also provides that:

> As stated below, any individual Party may also seek to pursue in its respective docket, either concurrent with or following the Consolidated Phase, any issue, claim, or counterclaim, including related discovery, that is not addressed in the Consolidated Phase.
>
> Nothing in this Joint Motion is intended, or shall be construed, as a waiver of any Party's right to amend and supplement its claims, counterclaims, or other pleadings, or to pursue any issue, claim, or counterclaim that is not addressed in

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10 Joint Motion in Dockets No. 2010-14-C through 2010-19-C at pp. 2-3.

> the Consolidated Phase in each Party's respective docket, either concurrent with or following the Consolidated Phase, or to seek such other relief as a change in circumstances may warrant.[11]

We find that the issues addressed by the Joint Motion (how much, if any, credit the resellers who are parties to those proceedings are entitled to receive when they resell services that are the subject of certain promotional offers) are different from the issue presented by EveryCall's Petition (who bears the risk of non-payment while billing disputes are being resolved). As explained above, we find that the ICA definitively answers the question presented by EveryCall's Petition by requiring EveryCall to pay all amounts AT&T South Carolina bills, even if EveryCall disputes those amounts.

EveryCall also suggests that AT&T South Carolina has somehow waived its right to require EveryCall to pay all amounts billed as required by the ICA because it has not exercised that right previously.[12] Once again, EveryCall's suggestion is refuted by the unambiguous language of the parties' Commission-approved ICA:

> A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the performance of any and all of the provisions of this Agreement.[13]

Even if AT&T South Carolina has not insisted that EveryCall pay all amounts (including disputed amounts) in the past, it clearly has the right to now insist upon the performance of any and all provisions of the ICA.

EveryCall further argues that AT&T South Carolina improperly denied its request, in October 2009, to "opt-in to the 'Image Access' interconnection agreement, which would

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11 *Id.* at 3

12 *See* Petition at p. 3, ¶7.

13 ICA, General Terms and Conditions, Page 15, §17.

specifically allow EveryCall to withhold payment for disputed amounts until those disputes were ultimately resolved."[14] We disagree. The parties' ICA became effective in November 2006,[15] and it clearly states that "[t]he initial term of this Agreement shall be five (5) years, beginning on the Effective Date . . . ."[16] During that five-year initial term, "EveryCall may request termination of this Agreement only if it is no longer purchasing services pursuant to this Agreement,"[17] which obviously is not the case. Additionally, "[n]o modification [or] amendment . . . shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties,"[18] and EveryCall does not allege any such modification or amendment. Finally, the ICA plainly states that negotiations for a new agreement shall commence "no earlier than two hundred seventy (270) days . . . prior to the expiration of the initial term of this Agreement . . . ."[19] We find that this language prohibited EveryCall from unilaterally terminating its ICA and "opting into" a different agreement in 2009.

EveryCall counters that Section 11 of the General Terms and Conditions of the ICA allowed it to opt into a new agreement in 2009.[20] We disagree. This section of the ICA simply incorporates the "adoption" provisions of section 252(i) of the federal Act into the ICA,[21] and it is well-settled that section 252(i) does not allow EveryCall to opt into another ICA any time it pleases. In *Global Naps, Inc. v. Verizon*, 396 F.3d 16 (1st Cir. 2005), for instance, a CLEC filed a petition for arbitration pursuant to section 252 and the state commission entered its order in that

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14 Petition at ¶9.

15 *See* ICA, General Terms and Conditions, at p. 2 ("Effective Date" is thirty days after last signature); at "Signature Page" (last signature is October 30, 2006).

16 *Id.*, p. 3, §2.1.

17 *Id.*, §2.3.1.

18 *Id.*, p. 15, §12.2.

19 *Id.*, p. 3, §2.2.

20 *See* Petition at p. 4, ¶9.

21 *See* ICA, General Terms and Conditions at p. 7, §11.

arbitration proceeding. Displeased with that order, the CLEC purported to opt into a preexisting interconnection agreement (with terms more to its liking) pursuant to section 252(i). The state commission, however, ruled that once it had concluded the arbitration and issued its order, the CLEC was not free to "opt into" another agreement pursuant to section 252(i) in lieu of accepting the arbitrated terms and incorporating them into its agreement. The First Circuit Court of Appeals affirmed that ruling, concluding that section 252(i) does not grant a CLEC like EveryCall an unconditional right to opt out of one agreement and into another.

More recently, the New York Commission logically extended the First Circuit's ruling to interconnection agreements that are negotiated instead of arbitrated.[22] Specifically, a CLEC executed an interconnection agreement with Verizon that did not expire until November 2007. Twenty months before that expiration date, the CLEC attempted to opt into a different interconnection agreement, claiming that "unilateral termination is authorized whenever a §252(i) option is exercised."[23] The New York Commission disagreed, explaining that the First Circuit's decision "not only refutes [the CLEC's] contention that it has an unconditional right to opt-in to another agreement but also that §252(i) authorizes voiding a contract."[24] It further held that "§252(i) does not confer an unconditional right to opt-in to an existing agreement or authorize unilateral termination of an existing interconnection agreement," and it ruled that the CLEC "is not authorized to terminate its current . . . interconnection agreement with Verizon."[25] This reasoning is persuasive, and we find that Section 11 of the General Terms and Conditions of

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22 *See* Declaratory Ruling, *Petition of Pac-West Telecomm, Inc. for a Declaratory Ruling Respecting Its Rights to Interconnection with Verizon New York, Inc.*, Case No. 06-C-1042 (February 27, 2007).

23 *Id.* at p. 8.

24 *Id.* at p. 10.

25 *Id.* at pp. 11-12.

the ICA did not allowed EveryCall to opt into a new agreement in 2009, and it does not allow EveryCall to do so at this time.

Finally, our denial of EveryCall's Petition renders AT&T South Carolina's arguments regarding the standards and requirements for injunctive relief moot, and therefore we do not address them here.

CONCLUSION

Based on the foregoing, it is hereby ordered that:

1. EveryCall's Petition is denied;

2. We rescind our order, set forth in Attachment A, that AT&T South Carolina not discontinue or terminate wholesale service to EveryCall pending this Commission's resolution of EveryCall's Emergency Petition;

3. EveryCall must immediately provide notification to its customers of AT&T South Carolina's Notice of Commencement of Suspension and Disconnection of Service; and

4. EveryCall must immediately provide the ORS with the names, addresses and phone numbers of its South Carolina customers.

This Order shall remain in full force and effect until further Order of the Commission.

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION:

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Elizabeth B. Flemming, Chairman

ATTEST:

_____

John E. Howard, Vice Chairman

Respectfully submitted this 7th day of July, 2010.

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Attachment A to AT&T South Carolina's Proposed Order
Docket No. 2010-233-C

Docket No. 2010-233-C – BellSouth Telecommunications, Incorporated d/b/a AT&T South Carolina's Notice of Commencement of Suspension and Disconnection of Service of EveryCall Communications, Inc.

In the Matter of

EveryCall Communications, Inc.'s Petition for Temporary, Emergency Relief to Prevent Suspension or Termination of Service

I move that proposed orders be required of EveryCall and AT&T by close of business July 9, 2010. Further, I move we order BellSouth d/b/a AT&T South Carolina not to discontinue or terminate wholesale service to EveryCall pending this Commission's resolution of EveryCall's Emergency Petition. However, in order not to exacerbate the scope of the problem, AT&T may go forward with its proposed date for suspension, absent a negotiated resolution of the dispute prior to July 13. Further, if a negotiated resolution of the dispute has not occurred by noon on Monday, July 12, EveryCall is ordered to immediately provide notification to its customers of AT&T's Notice of Commencement of Suspension and Disconnection of Service, and to also provide ORS with the names, addresses and phone numbers of its South Carolina customers.

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Jeanette B. Mattison, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina ("AT&T") and that she has caused AT&T South Carolina's Proposed Order in Docket No. 2010-233-C to be served upon the following on July 9, 2010:

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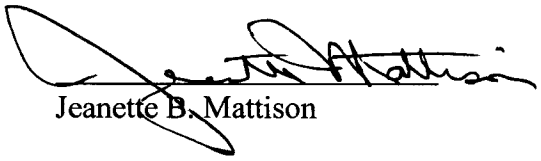

Jeanette B. Mattison

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